



Discovery insights

5 questions about cross-border eDiscovery challenges

An interview with Benton Armstrong, principal, Deloitte Transactions and Business Analytics LLP.

A growing number of companies are finding themselves confronted with the challenge of collecting, processing, reviewing and producing data from locations outside of the United States. Receiving a discovery request or data demand that crosses international borders can present a variety of challenges given today's international data privacy landscape.

Questions	Benton's take
<p>What is the current climate in the global regulatory environment concerning cross-border eDiscovery?</p>	<p>The global regulatory environment has expanded significantly over the past three years as more jurisdictions outside of the United States have been increasing their regulatory activity. In the United States, there appears to be an increasing number of Department of Justice (DOJ) investigations arising from referrals outside of the United States.</p> <p>As part of this growing regulatory environment, more jurisdictions are creating privacy and related regulatory regimes and legislation; however, many of these laws remain untested. These new regulations, of course, are in addition to established privacy regulations, like those in the European Union (EU).</p>
<p>How should corporations deal with data in jurisdictions outside of the United States?</p>	<p>A common strategy for dealing with data in jurisdictions outside of the US is to manage as much of the data as possible in the originating jurisdiction, minimizing the amount of data that leaves the country. This conservative approach has long been considered a best practice for data originating from EU countries. Now, given emerging legislation and an uncertain regulatory environment, more companies are taking a conservative approach in other jurisdictions and are often keeping the data in country as long as possible. As a result, the data for a given matter may not be in a single repository but may reside in multiple repositories across multiple countries.</p> <p>Data that is potentially responsive to litigation or an investigation which resides in multiple international jurisdictions often require careful cross-border management and the use of consistent processes and procedures. This is not a simple task given the inherent complexities and ever-increasing volumes of data in different jurisdictions.</p> <p>Additionally, consistency in work product and presentation is also important so that all members of the legal team are seeing the same information. In order to maintain consistency and increase efficiency, many counsel are demanding eDiscovery work product on cross-border engagements which looks and feels as if there were one set of data managed on a single system, including de-duplication across the entire data corpus.</p>
<p>How do foreign custodians stack up against custodians in the United States?</p>	<p>In our experience, we are finding that many foreign custodians have, on average, more data than their counterparts in the United States. This may suggest that corporate record retention guidelines have started to reduce the amount of data in the United States (or at least slowed data proliferation and growth), compared to many of our foreign counterparts. As data outside of the United States is expected to continue to grow, many companies may start requiring their international subsidiaries to implement record retention and defensible deletion practices consistent with the US entity.</p>

Questions	Benton's take
How can technology like predictive coding assist in cross-border eDiscovery?	Increasingly corporate counsel in the United States expect outside counsel and service providers to use analytic techniques such as predictive coding to deal with ever increasing data sets. Foreign languages can add an additional layer of complexity to the task, especially when documents contain multiple languages. One approach that Deloitte has developed to address this complexity incorporates the use of automated language identification, text tokenization and proprietary document scoring techniques to sort and prioritize large foreign language document sets. This approach can increase defensibility and help counsel reduce the risk of misinterpreting the results while also increasing the likelihood of creating an effective model. While counsel may be understandably concerned about the reliability of such technologies in foreign language data sets, similar levels of success have been observed using predictive technologies with English and non-English data sets.
What are some of the challenges associated with keyword searching in cross-border eDiscovery?	Foreign language data can also create a challenge for counsel who rely on keyword searching in their litigation or regulatory response effort. We have typically found that when keywords are translated by parties unfamiliar with the matter and the related data, and then those terms are run against the foreign data corpus, the results have been somewhat ineffective. That is, literal translation is not always effective in searching foreign language data sets. One approach to consider is having native speakers from the local jurisdiction sit with counsel in the United States, as well as with local counsel, to discuss the concepts and issues regarding the keyword search. When everyone works together to come up with a better set of keywords for the non-English language data set, the results can be greatly improved.

My take

All of the foregoing challenges require not only the technical skills to deal with data in countries outside the US, but also the experience with the local language, customs and legal environment. Consistent processes and data display through common methodology and approaches are often required to satisfy the needs of counsel and their client in cross-border litigation and regulatory investigations.

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